

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

FEDERAL DEPOSIT INSURANCE  
CORPORATION AS RECEIVER FOR  
FRONTIER BANK,

Plaintiff,

v.

MICHAEL J. CLEMENTZ, et al.,

Defendants.

CASE NO. C13-737 MJP

ORDER GRANTING IN PART,  
DENYING IN PART PLAINTIFF'S  
MOTION FOR JUDGMENT ON THE  
PLEADINGS, DEFENDANTS'  
MOTION TO SEAL

THIS MATTER comes before the Court on Plaintiff's Motion for Judgment on the Pleadings (Dkt. No. 116) and Defendants' Motion to Seal (Dkt. No. 123). Having considered the Parties' briefing and all related papers, the Court GRANTS in part and DENIES in part both motions.

**Background**

Plaintiff Federal Deposit Insurance Corporation as Receiver for Frontier Bank ("FDIC-R") brings suit against twelve former officers and directors of Frontier Bank, a failed bank, for

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1 damages in excess of forty-six million dollars stemming from their alleged negligence, gross  
2 negligence, and breaches of fiduciary duties in approving eleven particular loans made by the  
3 Bank. (Dkt. No. 60.)

4 In their Answer to the Amended Complaint, Defendants raised twenty affirmative  
5 defenses. (Dkt. No. 62.) Plaintiff now seeks to eliminate eleven of those affirmative defenses  
6 because they fail as a matter of law and Plaintiff would be unfairly prejudiced if it is forced to  
7 spend significant time and resources engaging in discovery, motion practice, and trial on the  
8 issues raised by these defenses. (Dkt. No. 116.)

9 Plaintiff challenges affirmative defenses one through seven and ten through thirteen,  
10 principally on three grounds. (Id.) First, Plaintiff argues that affirmative defenses two through  
11 six, which concern intervening or superseding causes and conduct, fail because they do not  
12 allege any legally cognizable superseding cause. Second, Plaintiff argues that affirmative  
13 defenses four and eleven through thirteen fail as a matter of law because the pre-receivership  
14 conduct of bank regulators and examiners cannot be imputed to the failed bank or to the FDIC as  
15 receiver. Finally, Plaintiff argues that affirmative defenses two through five, seven, and ten fail  
16 because FDIC-R does not owe a duty of care to Defendants—a required element for these  
17 defenses.

18 Arguing that the motion is an improper attempt to undermine their ability to offer  
19 important evidence to defend themselves, Defendants oppose the motion in its entirety. (Dkt.  
20 No. 125.)

## 21 Discussion

### 22 I. Legal Standards

#### 23 A. Judgment on the Pleadings

After the pleadings are closed, a party may move for judgment on the pleadings. Fed. R. Civ. P. 12(c). A judgment on the pleadings is properly granted when, taking all the allegations in the pleadings as true, the moving party is entitled to judgment as a matter of law. Milne ex rel. Coyne v. Stephen Slesinger, Inc., 430 F.3d 1036, 1042 (9th Cir. 2005).

#### B. Affirmative Defenses

Federal Rule of Civil Procedure 8(c) requires that “[i]n responding to a pleading, a party must affirmatively state any avoidance or affirmative defenses,” including nineteen enumerated defenses. “Affirmative defenses plead matters extraneous to the plaintiff’s prima facie case, which deny plaintiff’s right to recover, even if the allegations of the complaint are true.” United States v. Ctr. for Diagnostic Imaging, Inc., 2011 WL 6300174, at \*2 (W.D. Wash. Dec. 16, 2011) (quoting FDIC v. Main Hurdman, 655 F.Supp. 259, 262 (E.D. Cal. 1987)). Their purpose is to put “the plaintiff on notice that matters extraneous to his prima facie case are in issue.” Id.; see also Blonder–Tongue Lab., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 350 (1971).

The heightened pleading standard set out in Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S. 662 (2009), does not apply to affirmative defenses. In re Washington Mut., Inc. Sec., Derivative & ERISA Litig., 2011 WL 1158387, at \*1 (W.D. Wash. Mar. 25, 2011) (citing Wyshak v. City Nat’l Bank, 607 F.2d 724, 827 (9th Cir. 1979)). This is so because detailed pleading is not necessary to give fair notice to the plaintiff under Fed. R. Civ. P. 8(c) given that the core factual circumstances are already well known to the parties, and also because an inappropriate or mischaracterized defense will generally not subject the plaintiff to vexatious litigation, as a frivolous claim might. Id.

To obtain judgment on the pleadings as to affirmative defenses, the moving party must establish that “there are no questions of fact, that any questions of law are clear and not in

1 dispute, and that under no set of circumstances could the defense succeed.” Ctr. for Diagnostic  
2 Imaging, Inc., 2011 WL 6300174, at \*2 (quoting Kerzman v. NCH Corp., 2007 WL 765202, at  
3 \*7 (W.D. Wash. Mar. 9, 2007)).

#### 4 II. Failure to State a Claim

5 Plaintiff correctly observes that Defendants’ first affirmative defense, failure to state a  
6 claim upon which relief can be granted, is not an affirmative defense. Rather than pleading  
7 matters extraneous to Plaintiff’s prima facie case, as an affirmative defense does, the allegation  
8 that a plaintiff has failed to state a claim attacks the prima facie case on its own terms. See  
9 Zivkovic v. S. Cal. Edison Co., 302 F.3d 1080, 1088 (9th Cir. 2002). The Court therefore  
10 considers this affirmative defense a general denial.

#### 11 III. Superseding Cause

12 Affirmative defenses two through six assert the affirmative defense of intervening or  
13 superseding cause, alleging that other actors or forces are at fault for the monetary losses,  
14 including: the 2008 financial crisis (defense two), regulators’ alleged interference with Frontier  
15 Bank’s ability to raise capital (defense three), regulators’ alleged authorization and approval of  
16 Frontier Bank’s policies and practices (defense four), the FDIC’s post-receivership conduct  
17 (defense five), and the conduct of third parties, including the borrowers and other professionals  
18 involved with the loans (defense six). (Dkt. No. 62 at 35.) Plaintiff first argues that these  
19 defenses attack causation, an element of Plaintiff’s prima facie case, and thus are not affirmative  
20 defenses. (Dkt. No. 116 at 13.) Plaintiff also argues that Defendants are unable to establish the  
21 elements of intervening or superseding cause as a matter of law. (Id. at 13-18.)

22 A superseding cause is “a new independent cause that breaks the chain of proximate  
23 causation between a defendant’s negligence and an injury,” becoming “the sole proximate cause

of the injury” and preventing the defendant from being found “liable for harm to another which his antecedent negligence is a substantial factor in bringing about.” Wash. Pattern Jury Intr. § 15.05; Campbell v. ITE Imperial Corp., 107 Wn.2d 807, 812 (1987) (quoting the Restatement (Second) of Torts § 440 (1965)). “Whether an [intervening] act may be considered a superseding cause sufficient to relieve a defendant of liability depends on whether the intervening act can reasonably be foreseen by the defendant; only intervening acts which are not reasonably foreseeable are deemed superseding causes.” Crowe v. Gaston, 134 Wn.2d 509, 519 (1998) (citations omitted). In determining whether an intervening act constitutes a superseding cause, some relevant considerations are: “(a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence; (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation; (c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation; (d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act; (e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him; (f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.” Restatement (Second) of Torts § 442 (1965) (cited with approval by Campbell, 107 Wn.2d at 812-13).

The Court DENIES the motion as to defenses two, three, five and six. Proximate cause is a fact-sensitive determination not suitable for a decision on the pleadings alone. Furthermore, the facts underlying each of these defenses will remain relevant to Plaintiff's case in chief regardless of whether the affirmative defenses survive, and thus granting the motion would not

1 reduce the burden of discovery or trial as Plaintiff suggests it would. Judgment on the pleadings  
2 as to defenses two, three, five, and six is DENIED.

3 IV. No Duty Rule, Discretionary Conduct, Public Duty Doctrine

4 Plaintiff argues that affirmative defenses two through five (superseding cause), seven  
5 (failure to mitigate damages), and ten (contributory fault) fail because the FDIC owes no duty to  
6 Defendants under the so-called no duty rule, because Defendants cannot “second-guess” the  
7 FDIC’s actions under the discretionary function exception to the Federal Tort Claims Act, and  
8 because the defenses are barred by Washington’s public duty doctrine. (Dkt. No. 116 at 8, 18-  
9 20, 24-27, 129 at 10-11.)

10 The Court DENIES the motion on these grounds. Plaintiff has already raised, and the  
11 Court has already rejected, Plaintiff’s no duty rule and public duty doctrine arguments in the  
12 context of a motion to compel. (Dkt. No. 79.) In rejecting these arguments, this Court adopted  
13 the reasoning of the Court in FDIC v. Sheehan, Case No. 2:13-cv-0671 JCC, Dkt. No. 47 (W.D.  
14 Wash. 2013), which agreed with those courts that have found that the no duty rule—a federal  
15 common law precept providing that the FDIC owes no duty to the officers and directors of failed  
16 banks because the FDIC’s sole purpose is to promote the stability of the banking system and to  
17 protect depositors, the insurance fund, and the public—does not survive the Supreme Court’s  
18 decision in O’Melveny & Myers v. FDIC, 512 U.S. 79 (1994), which forbade federal common  
19 law additions to the governing statutory framework. FDIC v. Sheehan, Case No. 2:13-cv-0671  
20 JCC, Dkt. No. 47 (W.D. Wash. 2013). The Court in Sheehan also rejected application of the  
21 Federal Tort Claims Act (“FTCA”)’s discretionary function exception to affirmative defenses  
22 pleaded against the FDIC because the FTCA applies to tort claims raised against the United  
23 States, and does not preclude state law affirmative defenses when the government brings claims.

1 Id. Finally, while the Court's order on Defendants' motion to compel does not specifically  
2 address the public duty doctrine, Plaintiff raised the doctrine in an unsuccessful attempt to avoid  
3 producing certain documents. As Defendants correctly point out, the doctrine precludes liability  
4 for the State's negligent conduct but does not preclude affirmative defenses based on that  
5 conduct. To the extent the Court's previous order did not make clear that the discretionary  
6 function exception, public duty doctrine, and no duty rule do not bar the affirmative defenses in  
7 this case, the Court now so rules.

8 V. Pre-Receivership Conduct of Bank Examiners

9 Plaintiff argues that affirmative defenses four (superseding cause, regulators' alleged  
10 authorization and approval of Frontier Bank's policies and practices during time when loans  
11 were made), and eleven through thirteen (assumption of the risk, equitable estoppel as a result of  
12 regulators' approval and authorization of loans at issue, equitable estoppel as a result of  
13 regulators' interference with Frontier Bank's ability to raise capital prior to closing the bank) fail  
14 because the conduct of the FDIC in its regulatory capacity, when acting as a bank examiner or in  
15 connection with the closure of a bank, may not be imputed to the FDIC in its capacity as  
16 receiver. (Dkt. No. 116 at 23.)

17 "[U]nder federal law, the FDIC is empowered to act in two entirely separate and distinct  
18 capacities in proceedings involving an insured state bank." FDIC v. Nichols, 885 F.2d 633, 636  
19 (9th Cir. 1989) (internal quotation marks and citation omitted). "Because FDIC Corporate and  
20 FDIC Receiver perform two different functions and protect wholly different interests, courts  
21 have been careful to keep the rights and liabilities of these two entities legally separate." Bullion  
22 Servs., Inc. v. Valley State Bank, 50 F.3d 705, 709 (9th Cir. 1995).

1 Defendants argue that the FDIC-R should be accountable for the FDIC's regulatory  
2 oversight of the failed bank, and point out that any damages recovered would accrue to the  
3 benefit of the depositary insurance funds, but cite to no authority that supports their position.  
4 (Dkt. No. 125 at 25.)

5 The Court GRANTS the motion as to defenses four and eleven through thirteen because  
6 the FDIC's conduct in its regulatory capacity cannot be imputed to the failed bank or to the  
7 FDIC-R, which stands in the shoes of the failed bank and is legally separate from FDIC-  
8 Corporate. However, as Defendants point out and this Court has already ruled, the FDIC's  
9 conduct as regulator and examiner remains relevant to whether Defendants breached their duties  
10 of care, and Defendants are still entitled to raise the FDIC's approval and authorization of  
11 specific loans to attack Plaintiff's case in chief.

#### 12 VI. Motion to Seal

13 Defendants move to seal their Response and certain exhibits in support of their Response  
14 because they contain sensitive information about borrowers' identities or because the FDIC has  
15 classified the documents as confidential. (Dkt. No. 123.)

16 The Court GRANTS in part and DENIES in part the motion. The exhibits supporting  
17 Defendants' Response shall be sealed because they contain sensitive and identifying information  
18 about borrowers, including some borrowers in the loans at issue in this case. Defendants'  
19 Response itself, however, shall not be sealed. This is a dispositive motion, and the Reponse only  
20 makes reference to the borrowers and loans through the same pseudonyms used in the  
21 Complaint, which is not sealed. The pseudonyms are sufficient to protect the borrowers'  
22 privacy.



**Conclusion**

The Court GRANTS in part and DENIES in part the motions. Judgment on the pleadings as to defenses four, eleven, twelve, and thirteen is GRANTED with prejudice. Judgment on the pleadings as to all other defenses raised in this motion is DENIED. Defendants' Motion to Seal is GRANTED in part and DENIED in part. The clerk is ORDERED to unseal Dkt. No. 125, and to maintain Dkt. No. 126 under seal.

The clerk is ordered to provide copies of this order to all counsel.

Dated this 23rd day of September, 2015.



Marsha J. Pechman  
Chief United States District Judge